Continental Packaging Corp., and Continental Pak Corp., as Successors in Interest and/or Alter Egos of Poly Convertors of America, Inc. and/or Ace Cellophane and Poly Convertors of America, Inc. *and* National Organization of Industrial Trade Unions. Case 29–CA–19957

December 31, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

Upon a charge filed by the Union on April 25, 1996, the General Counsel of the National Labor Relations Board issued a complaint and Notice of Hearing on October 26, 1998, against Continental Packaging Corp., and Continental Pak Corp., as Successors in Interest and/or alter egos of Poly Convertors of America, Inc., and/or Ace Cellophane and Poly Convertors of America, Inc., herein collectively, the Respondents, alleging that they have violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondents failed to file an answer.

On November 23, 1998, the General Counsel filed a Motion for Summary Judgment with the Board. On November 25, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondents filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted.[1]

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Poly Convertors of America, Inc., herein individually called Respondent Poly, has been a New York corporation, with its principal office and place of business located at 75 Onderdonk Avenue, Ridgewood, New York, (the Ridgewood facility), where it is engaged in the business of converting, printing, servicing, and manufacturing plastic bags.

During the 12-month period preceding issuance of the complaint, which period is representative of its operations in general, Respondent Poly, in the course and conduct of its business operations, sold and shipped from the Ridgewood facility goods and materials valued in excess of $5000 directly to Goya Foods, Inc., and to other enterprises located outside the State of New York.

During the same 12-month period, Respondent Poly, in conducting its business operations, purchased and received at the Ridgewood facility goods, including but not limited to, inks, solvents, and plastics, valued in excess of $5000 directly from suppliers located outside the State of New York and purchased and received goods, including but not limited to, inks, solvents, and plastics, valued in excess of $5000 from other enterprises located within the State of New York, each of which other enterprises, in turn, had received these goods directly from points located outside the State of New York. During the same 12-month period, Respondent Poly, in conducting its business operations, purchased and received goods valued in excess of $5000 at the Ridgewood facility, directly from suppliers located outside the State of New York and from other enterprises located within the State of New York, each of which other enterprises had received those goods directly from points outside the State of New York.

On or about June 25, 1995, Respondent Poly filed a voluntary Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court for the Eastern District of New York.

Since on or about June 25, 1995, until April 25, 1996, when the above described petition was dismissed, Respondent Poly was a debtor-in-possession with full authority to continue its operations and to exercise all powers necessary to administer its business.

At all material times, Ace Cellophane, which is also known as Ace Cellophane & Polyethylene Corp., which is also known as Ace Cellophane & Poly Corp. f/k/a Crown Poly Corp., (Respondent Ace), has been a New York corporation, with its principal office and place of business located at the Ridgewood facility, where it is engaged in the business of converting, printing, servicing, and manufacturing plastic bags.

During the 12-month period preceding issuance of the complaint, which period is representative of its operations in general, Respondent Ace, in the course and con-

[1] The motion alleges, inter alia, that copies of the complaint and notice of hearing were served by regular mail, certified mail, and personally. The copies served by mail were returned to the Regional Office stamped "refused." The Respondents' failure or refusal to accept service cannot defeat the purposes of the Act. See, e.g., *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986). Therefore, we find that the Respondents were properly served with the complaint and notice of hearing.

duct of its business operations sold and shipped from the Ridgewood facility goods and materials valued in excess of $5000 directly to Goya Foods, Inc., and to other enterprises located outside the State of New York.

During the same 12-month period, Respondent Ace, in conducting its business operations, purchased and received at the Ridgewood facility goods including but not limited to, inks, solvents, and plastics, valued in excess of $5000 directly from suppliers located outside the State of New York and purchased and received at the Ridgewood facility goods, including but not limited to, inks, solvents, and plastics, valued in excess of $5000 from other enterprises located within the State of New York, each of which other enterprises, in turn, had received those goods directly from points located outside the State of New York.

During the same 12-month period, Respondent Ace, in conducting its business operations, purchased and received goods valued in excess of $5000 at the Ridgewood facility, directly from points located outside the State of New York and from other enterprises located within the State of New York, each of which other enterprises had received the goods directly from outside the State of New York.

At all material times, Respondent Continental Packaging Corporation, (Respondent Continental), has been a New York corporation, with its principal office and place of business located at the Ridgewood facility, where it is engaged in the business of converting, printing, servicing, and manufacturing plastic bags.

During the 12-month period preceding issuance of the complaint, which period is representative of its operations in general, Respondent Continental, in the course and conduct of its business operations, sold and shipped from the Ridgewood facility goods and materials valued in excess of $5000 directly to Goya Foods, Inc., and to other enterprises located outside the State of New York, and purchased and received at the Ridgewood facility goods, including but not limited to, inks, solvents, and plastics, valued in excess of $5000 directly from suppliers located outside the State of New York.

During the same 12-month period, Respondent Continental, in conducting its business operations, purchased and received at the Ridgewood facility goods, including but not limited to, inks, solvents, and plastics, valued in excess of $5000 from other enterprises located within the State of New York, each of which other enterprises, in turn, had received those goods directly from points located outside the State of New York and purchased and received goods valued in excess of $5000 at the Ridgewood facility, directly from points located outside the State of New York and from other enterprises located within the State of New York, each of which other enterprises had received the goods directly from points outside the State of New York.

At all material times, Continental Pak Corp., (Respondent Pak), has been a New York corporation, with its principal office and place of business located at the Ridgewood facility, where it is engaged in the business of converting, printing, servicing, and manufacturing plastic bags.

During the 12-month period preceding issuance of the complaint, which period is representative of its operations in general, Respondent Pak, in the course and conduct of its business operations, sold and shipped from the Ridgewood facility goods and materials valued in excess of $5000 directly to Goya Foods, Inc., and to other enterprises located outside the State of New York and purchased and received at the Ridgewood facility goods, including but not limited to, inks, solvents, and plastics, valued in excess of $5000 directly from suppliers located outside the State of New York.

During the same 12-month period, Respondent Pak, in conducting its business operations, purchased and received at its Ridgewood facility goods, including but not limited to, inks, solvents, and plastics, valued in excess of $5000 from other enterprises located within the State of New York, each of which other enterprises, in turn, had received those goods directly from points located outside the State of New York and purchased and received goods valued in excess of $5000 at the Ridgewood facility, directly from points located outside the State of New York and from other enterprises located within the State of New York, each of which other enterprises had received the goods directly from points outside the State of New York.

On or about July 31, 1996, subpoenas duces tecum and subpoenas ad testificandum were issued to Jacob Deutsch, president and part owner of Ace, Poly and Pak, and general manager of Continental; Mark Rosenfeld, president, owner, CEO and principal of Continental; and Katey Brisk, bookkeeper for Continental and Pak, requesting that they appear, testify, and produce certain books and records enumerated in the subpoena duces tecum, to determine, inter alia, whether the Respondents are enterprises that fall within the Board's discretionary jurisdictional standards.

Neither the Respondents nor their agents complied with these subpoenas notwithstanding their enforcement by the United States District Court for the Eastern District of New York and the service of that enforcement order on the Respondents and their agents.

Under these circumstances, where the Respondents have refused to provide information relevant to the Board's jurisdictional determination, only statutory jurisdiction need be established for the General Counsel to establish a sufficient basis for the assertion of jurisdiction.[2]

[2] *Tropicana Products*, 122 NLRB 121 (1959).

Accordingly, we find that Respondents Poly, Ace, Continental, and Pak are employers within the meaning of Sections 2(2), (6), and (7) of the Act. We also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondents, herein called the unit, constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time plant and production workers employed at the Ridgewood facility excluding all other employees, guards and supervisors as defined in the Act.

At all material times, since at least January 1992, the Union has been the designated exclusive collective-bargaining representative of the employees in the unit, and until a date during either the first or second week in March 1996, was recognized as such by Respondent Ace and Respondent Poly. Such recognition was embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period from January 1, 1995, to December 31, 1997.

At all material times, since at least approximately January 1992, the Union, by virtue of Section 9(a) of the Act, has been the exclusive collective-bargaining representative of the employees in the Unit.

The most recent collective-bargaining agreement contains, inter alia, provisions requiring Respondent Ace and Respondent Poly (1) to make periodic payments on behalf of the unit to the Union's insurance trust fund which provided medical and dental benefits, and life insurance coverage; (2) to provide contributions to the Union's pension fund; and (3) to deduct dues from the wages of employees in the unit, who execute voluntary, written authorizations, and to remit said moneys to the Union on their behalf.

On or about a date presently unknown, but within 6 months of the filing of the charge, Respondent Continental and Respondent Pak were established by Respondent Ace and Respondent Poly as subordinate instruments to and disguised continuances of Respondent Ace and Respondent Poly.

Based on the conduct described above, Respondent Continental and Respondent Pak are alter egos of and a single employer with Respondent Ace and Respondent Poly.

Further, even assuming arguendo that Respondent Continental and Respondent Pak are not alter egos of Respondent Ace and Respondent Poly, we also find that they are successor employers inasmuch as, on a date presently unknown, but within 6 months of the filing of the charge, Respondent Continental and Respondent Pak purchased the business of Respondent Ace and Respondent Poly, and since then have continued to operate those businesses in basically unchanged form, and have employed as a majority of their employees individuals who were previously employees of Respondent Ace and Respondent Poly.

From on or about October 25, 1995, until December 31, 1997, the Respondents have failed and refused to make contributions to the Union's insurance trust fund and the Union's pension fund, (the funds), on behalf of the unit, as required by the most recent collective-bargaining agreement.

Since December 31, 1997, the Respondents have failed and refused to make contributions to the funds on behalf of the unit, notwithstanding that no impasse and no successor agreement had been reached.

From on or about October 25, 1995, until December 31, 1997, the Respondents failed and refused to deduct and remit dues to the Union on behalf of the unit, as required by the most recent collective-bargaining agreement.

The Respondents engaged in the conduct described above without the consent of the Union.

The subjects set forth above relate to wages, hours and other terms and conditions of employment of employees in the unit.

Sometime during either the first or second week of March 1996, the Respondents withdrew recognition from the Union as the exclusive bargaining representative of the unit.

On or about May 28, 1996, by letter, the Union requested that Respondent Continental, as a successor in interest and/or alter ego of Respondent Poly and Respondent Ace, recognize and bargain with it as the exclusive collective-bargaining representative of the unit.

Since on or about May 28, 1996, the Respondents have failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

By the acts described above, the Respondents have been failing and refusing to bargain collectively with the representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

By withdrawing recognition from the Union, by failing to continue in effect all the terms and conditions of the January 1, 1995, to December 31, 1997 collective-bargaining agreement, and by failing to make required payments to the funds since December 31, 1997, the Respondents have failed and refused to bargain collectively and are continuing to fail and refuse to bargain collectively with the Union as the exclusive collective-bargaining representative of the unit, and have thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondents have violated Section 8(a)(1) and (5) by failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit, and by failing and refusing to make contributions to the Union's insurance trust fund and the Union's Pension fund on behalf of the unit as required by the most recent collective-bargaining agreement and notwithstanding that no impasse and no successor agreement have been reached, we shall order the Respondents to make whole their unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondents shall reimburse unit employees for any expenses ensuing from their failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd, mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

Furthermore, having found that the Respondents violated Section 8(a)(5) and (1) by failing and refusing to deduct and remit dues to the Union, from on or about October 25, 1995 until December 31, 1997, on behalf of the unit, we shall order the Respondents to deduct and remit Union dues as required by the contract, and to reimburse the Union for their failure to do so, with interest as prescribed in *New Horizons for the Retarded,* supra.

ORDER

The National Labor Relations Board orders that the Respondents, Continental Packaging Corp., and Continental Pak Corp., as Successors in Interest and/or Alter Egos of Poly Convertors of America, Inc. and/or Ace Cellophane and Poly Converters of America, Inc., Ridgewood, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from the Union as the exclusive collective-bargaining agent of the unit during the term of the collective-bargaining agreement with the Union.

(b) Failing to continue in effect all the terms and conditions of the collective-bargaining agreement with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time plant and production workers employed at the Ridgewood facility excluding all other employees, guards and supervisors as defined in the Act.

(b) Honor the terms and conditions of employment of the 1995–1997 agreement until a new agreement or good-faith impasse is reached, make the unit employees whole for any loss of benefits or expenses ensuing from the failure to make all contractually required contributions to the Union's insurance trust fund and the Union's pension fund since on or about October 25, 1995, and make the required contributions to those funds, in the manner set forth in the remedy section of this decision.

(c) Deduct and remit authorized union dues as required by the 1995–1997 agreement since about October 25, 1995, and reimburse the Union for their failure to do so, with interest, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at their facility in Ridgewood, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, one of the Respondents have

[3] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Respondents' delinquent contributions during the period of the delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents otherwise owe the fund.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

gone out of business or closed the facility involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT withdraw recognition from the National Organization of Industrial Trade Unions as the exclusive collective-bargaining agent of the unit during the term of the collective-bargaining agreement with the Union.

WE WILL NOT fail to continue in effect all the terms and conditions of the collective-bargaining agreement with the Union

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union and put in writing any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time plant and production workers employed at the Ridgewood facility excluding all other employees, guards and supervisors as defined in the Act.

WE WILL honor the terms and conditions of employment of the 1995–1997 agreement until a new agreement or good-faith impasse is reached, make the unit employees whole for any loss of benefits or expenses ensuing from our failure to make all contractually required contributions to the Union's insurance trust fund and the Union's pension fund since on or about October 25, 1995,and make the required contributions to those funds.

WE WILL deduct and remit authorized union dues as required by the 1995–1997 agreement since about October 25, 1995 and reimburse the Union for our failure to do so, with interest.

CONTINENTAL PACKAGING CORP., AND CONTINENTAL PAK CORP., AS SUCCESSORS IN INTEREST AND/OR ALTER EGOS OF POLY CONVERTORS OF AMERICA, INC. AND/OR ACE CELLOPHANE AND POLY CONVERTORS OF AMERICA, INC.